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# *Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK*

Despoina Mantzari\*

**Abstract**—This article examines the issue of the appropriate scope of review of economic evidence enshrined in the discretionary assessments of utility regulators in the US and the UK. It advances a balance of institutional competencies approach to the question of the degree of deference owed to the regulatory agency's economic assessments. In doing so, it revisits the doctrinal positions advanced in the US and the UK for the substantive review of administrative discretion, so as to become attuned to the challenges posed by economic evidence. Drawing on insights from political science and economics, the suggested approach illuminates the institutional disadvantages of the courts that may warrant a high degree of deference. At the same time, however, it remains sensitive to the polycentric elements of regulatory disputes as well as to a number of institutional realities that may attenuate the weight of such comparative institutional disadvantages.

**Keywords:** judicial review, adjudication, economic regulation, evidence, comparative law, administrative law

## 1. *Introduction*

The prominent role acquired by expert economic evidence and analysis<sup>1</sup> in the regulatory and adjudicative process of utility regulation (ie energy, telecoms,

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<sup>1</sup> Economic evidence and analysis, as understood in this article, derives from the field of industrial organisation and informs regulatory decisions concerning, amongst others, access to networks and price regulation. Economic analysis employed to understand and measure the costs and benefits of different policy options (ie cost–benefit analysis) is outside the scope of this article. See further DW Carlton and JM Perloff,

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water) has renewed policy interest in regulatory appeals.<sup>2</sup> From Australia to the UK, several jurisdictions have been focusing their attention on the review mechanisms of regulatory decisions in the utilities sector, as evidenced by a number of high-profile policy reforms.<sup>3</sup> One of the central themes of this emerging academic and policy debate on regulatory appeals concerns the appropriate scope of review of economic evidence enshrined in the regulators' decisions. Couched in the familiar language of 'judicial deference' versus 'non-deference', the scope of review encompasses questions concerning the standard of review (eg correctness, reasonableness) and the intensity thereof. Naturally, such questions arise both in the context of judicial control of agency statutory interpretation and that of agency fact finding and policy making.<sup>4</sup> The focus of this article, however, is on the latter theme only. Assuming that appeals serve as a mechanism for ensuring the soundness and accuracy of regulatory decisions, does and should economic evidence change the scope and intensity of review? This article represents the first attempt to address these questions. In doing so, it engages in a comparative analysis of the court-regulatory agency relationship in the realm of policy in two common law jurisdictions: the US (on the federal level) and the UK.<sup>5</sup> As will be shown in Section 3, significant institutional differences exist between the US and the UK with regard to the procedures available for the review of economic evidence. Hence, the choice of these comparator jurisdictions permits the observation of how economic evidence is reviewed in different institutional settings and the role of the different standards of review for the judicial scrutiny of economic evidence. That said, the article focuses on the substantive review of economic evidence enshrined in the discretionary assessments of the federal regulators of energy (Federal Energy Regulatory Commission, FERC)<sup>6</sup> and communications (Federal Communications Commission, FCC)<sup>7</sup> in the US<sup>8</sup> and the sectoral

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Modern Industrial Organization (4th edn, Addison-Wesley 2004); C Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (CUP 2014).

<sup>2</sup> The term 'regulatory appeals' is used broadly to encompass both the supervisory character of review (judicial review) and the appellate one (merits review). See further Section 3.

<sup>3</sup> In Australia see Standing Council on Energy and Resources, 'Review of the Limited Merits Review Regime' (July 2012) <[www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/lmr-review/](http://www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/lmr-review/)> accessed 17 September 2015. In the UK, see Department for Business, Innovation and Skills, 'Streamlining Regulatory and Competition Appeals-Consultation on Options for Reform' (June 2013) 82-7 <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf)> accessed 17 September 2015.

<sup>4</sup> Assume that there exist reasonably clear and objective criteria for separating questions of law from questions of fact and policy.

<sup>5</sup> The UK refers to the England and Wales jurisdiction unless otherwise stated.

<sup>6</sup> The FERC is an agency within the Department of Energy and has assumed responsibilities and powers previously held by the Federal Power Commission. It is charged with implementing and enforcing the Federal Power Act 1935, the Natural Gas Act 1938, the Natural Gas Policy Act 1978 and various other pieces of federal energy legislation.

<sup>7</sup> The FCC was established by the Communications Act of 1934 and is responsible for regulating interstate and international communications by radio, TV, wire, satellite and cable across the US.

<sup>8</sup> The US lacks a federal regulator for water.

regulators of communications (Office of Communications, OFCOM),<sup>9</sup> energy (Office of Gas and Electricity Markets, Ofgem)<sup>10</sup> and water (Office of Water Services, OFWAT)<sup>11</sup> in the UK. Such assessments are typically challenged by the ‘arbitrary, capricious or abuse of discretion’<sup>12</sup> ground of review of the Administrative Procedure Act (APA)<sup>13</sup> of 1946 in the US and by the *Wednesbury*<sup>14</sup> unreasonableness, or what has now become the irrationality ground of review in the UK.<sup>15</sup>

The article suggests that courts, when reviewing the regulators’ economic assessments, should embrace comparative institutional competencies considerations alongside constitutional, institutional and historical considerations that have informed the scope and intensity of substantive review of the regulatory agency’s discretion. It thus advocates that a balance of comparative institutional competencies approach to deference may provide a better understanding of the proper contours of judicial deference to the regulators’ economic assessments. This approach—which draws significantly on Neil Komesar’s analytical framework of comparative institutional analysis<sup>16</sup>—envisioned that, when faced with the regulatory agencies’ discretionary economic assessments, courts should weight their relative institutional advantages and disadvantages in resolving such issues against that of the regulators before deciding on the appropriate amount of deference to accord to the agency’s economic assessments.<sup>17</sup> Komesar approaches institutions, such as the adjudicative and regulatory process, as imperfect alternative mechanisms by which societies carry out their goals. Because one institution may be better able to implement those goals than another institution, comparative institutional analysis stresses the primary role of institutional choice: ‘the decision of who decides’.<sup>18</sup> Komesar approaches these choices in ‘participatory terms’ (the direct or indirect participation in the decision making of the affected stakeholders). Which institution brings out the diversity of affected interests on a given issue, while avoiding situations of both ‘minoritarian bias’ (the over-representation of

<sup>9</sup> But only with respect to the regulation of telecommunications. OFCOM was established by the Communications Act 2002 and operates under a number of Acts of Parliament and other statutes. It is responsible for regulating the TV and radio sectors, fixed-line telecoms, mobiles, postal services and the airwaves over which wireless devices operate.

<sup>10</sup> Ofgem was set up by the Utilities Act in 2000. It is charged with implementing the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002, the Energy Acts of 2004, 2008, 2010 and 2011 and the relevant EU legislation, as well as the administration of a number of environmental projects on behalf of the Department of Energy and Climate Change.

<sup>11</sup> OFWAT was established by the Water Act 2003 and is responsible for the regulation of the water and sewerage industries in England and Wales.

<sup>12</sup> APA, 5 USC § 706(2) (A).

<sup>13</sup> See APA. Pub L No 79-404, Ch 324, 60 Stat 237 (1946) (codified as amended in scattered sections of 5 USC).

<sup>14</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>15</sup> *CCSU v Minister for the Civil Service* [1985] AC 374 (HL).

<sup>16</sup> NK Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 26.

<sup>17</sup> *ibid* 3–13.

<sup>18</sup> *ibid* 3.

minority interests seeking rents) and ‘majoritarian bias’ (the over-representation of majority interests, such as consumers)?<sup>19</sup>

Significant scholarly attention has focused on the relative institutional advantages and disadvantages of courts in assessing different types of evidence (ie scientific, economic, forensic) and in various areas of law (ie securities regulation, competition law).<sup>20</sup> This article seeks to contribute to this body of literature by contextualising some of the institutional competencies claims in the so far unexplored area of economic evidence in regulatory disputes. That said, it does not attempt to provide a ‘golden rule’ concerning the appropriate degree of deference to the regulators’ economic assessments. The ambition is much narrower and is critical: it is to stress that any determination of the appropriate scope of review of economic evidence should avoid single-factor considerations (eg that judges do not possess expertise in economics) in favour of a richer set of institutional factors. A comparative institutional analysis approach to deference, as undertaken in this article, serves to illuminate these factors.

The article is structured as follows. Sections 2 and 3 present the context in which the analysis of the suggested comparative institutional competencies approach will be conducted. Section 2 discusses the relevance of economic evidence in regulatory disputes and explores its implications for the review of regulatory agencies’ decisions. Section 3 provides an overview of the different avenues for challenging regulatory decisions in the US and the UK. Section 4 examines the doctrinal positions advanced in the US and the UK for the substantive review of regulatory agency discretion and Section 5 advances the balance of institutional competencies approach to deference. Finally, in Section 6, some concluding observations are offered on the implications of the substantive analysis for the current debate on regulatory appeals in the UK.

## 2. *Economic Evidence in Regulatory Disputes: Scope and Implications*

It would be impossible to investigate the relationship between the court and the regulatory agency against the backdrop of economic evidence without first venturing into the legal relevance and implications of economic evidence in regulatory disputes. Doing so will help one to better appreciate the significance of comparative institutional competencies considerations in determining the degree of deference to the regulators’ economic assessments.

<sup>19</sup> *ibid* 27.

<sup>20</sup> See eg WN Eskridge, ‘Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes’ (2013) 2013(2) *Wisconsin L Rev* 412; P Swire, ‘Finding the Best of the Imperfect Alternatives for Privacy, Health IT and Cybersecurity’ (2013) 2013(2) *Wisconsin L Rev* 649; EL Rubin, ‘The Illusion of Property as a Right and its Reality as an Imperfect Alternative’ (2013) 2013(2) *Wisconsin L Rev* 573; I Lianos, ‘Some Reflections on the Question of Goals of EU Competition Law’ in I Lianos and D Geradin (eds), *Handbook on European Competition Law—Substantive Aspects* (EE 2013) 1.

### A. The Legal Relevance and Challenges of Economic Evidence in Regulatory Disputes

There are at least two ways in which economic evidence influences the adjudication of regulatory disputes. The first one is direct and refers to the presentation of economic evidence in the courtroom. Economists are routinely called upon to testify as economic expert witnesses and prove specific economic facts. Depending on the court's rules of procedure, they may be invited by the parties or appointed by the courts. Furthermore, economists may act as factual witnesses and assist the judge in grasping the economic concepts that permeate the body of law governing the regulation of utilities.<sup>21</sup>

The second one is indirect and refers to the increased recourse to economic evidence and analysis when interpreting the economic concepts enshrined in the body of law governing the regulation of utilities. For example, EC Regulation 2887/2000 requires notified operators (ie those operators of fixed public telephone networks designated by the national regulatory authorities as having significant market power) to 'charge prices for unbundled access to the local loop and related facilities set on the basis of cost-orientation'.<sup>22</sup> In the same vein, the US Telecommunications Act 1996 instructs federal regulators to disallow prices that are not 'just and reasonable'.<sup>23</sup> Hence, economic evidence may inform both questions of law (the legal meaning to be accorded to the statutory term 'reasonable price') and questions of fact (whether the factual nature of the regulatory price-setting process comes within the legal definition of a 'reasonable price' for the purposes of the statute)—if one adheres to such a distinction.<sup>24</sup>

The above-mentioned direct and indirect influence of economic evidence in regulatory disputes has two crucial implications for the adjudication of regulatory disputes. First, economic evidence presents cognitive challenges for the judge, in the sense that he is called upon to rely on economic authority as opposed to legal authority as a conceptual basis of his reasoning. To take one example, without relying on economic authority, it is difficult to determine whether the factual nature of the rate-making process comes within the legal definition of a 'just and reasonable' price. In such cases, the judge may seek interpretive guidance in 'soft law' instruments, such as guidelines and recommendations issued by the EC and the US federal agencies, which often incorporate economic authority. These documents reflect a *hybrid discourse*, as they are informed by communications characterising the domains of both law and economics. In fact, 'soft law' can be viewed as the institutional embodiment of the 'conversations' between lawyers and economists working

<sup>21</sup> See eg *BT v OFCOM* (PPC) [2011] CAT 5 (PPC case), para 66.

<sup>22</sup> Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop [2000] OJ L336/4, art 3, 3.

<sup>23</sup> US Telecommunications Act of 1996, Pub L No 104-104, 110 Stat 56, codified at 47 USC §§151 *et seq.*

<sup>24</sup> RJ Allen and MS Pardo, 'The Myth of the Law—Fact Distinction' (2003) 97 Nw Univ L Rev 1769.

together in the regulatory agency.<sup>25</sup> The judge may also rely on the assistance of an economic expert. In doing so, he may be said to admit limitations to his authority to proclaim 'what the law is', precisely because the economic dimension of the law invites the assistance of an economic expert.<sup>26</sup> Scot Brewer summarises this phenomenon in the term 'epistemic deference'.<sup>27</sup>

Secondly, economic evidence frequently informs policy decisions which involve technical aspects (eg the design of the appropriate pricing methodology) and value judgments. For example, the implementation of the unbundling provisions of deregulatory acts in the telecommunications sector—those provisions which require the incumbent to share the components of its network (eg switches, trunks, loops) with a rival party—involves a huge trade-off between the objectives of static<sup>28</sup> and dynamic<sup>29</sup> efficiency.<sup>30</sup> Mandating access to all components of the network can potentially diminish the incentives of the new entrants to build their own network infrastructure, and those of the incumbents to keep up and improve their property.<sup>31</sup> Denying access, on the other hand, may increase the incumbents' market power, thus impeding competition from new entrants. In such cases, the courts are confronted with a policy choice and judges are required to assess whether the economic methodologies employed by the regulatory agency are fit for purpose and whether the inferences drawn from economic analysis are sufficiently robust to support the regulator's policy decision.

### B. *The Case of Polycentric Regulatory Disputes*

The challenges posed by economic evidence merit special attention in the case of regulatory disputes that present 'polycentric' elements.<sup>32</sup> In the Fullerian sense, a polycentric task is one that encompasses a large and complicated web of interdependent relationships.<sup>33</sup> In such cases, a decision taken may affect many actors, thus leading to a fluid state of affairs if all affected interests are taken into account. However, polycentricity may as well refer to situations where a decision affecting one actor could have a different set of repercussions for other parties, leading to a redefinition of the parties affected.

<sup>25</sup> J Black, 'Talking about Regulation' [1998] PL 77; I Lianos, 'Lost in Translation? Towards a Theory of Economic Transplants' (2009) 62 CLP 346.

<sup>26</sup> S Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 Yale LJ 1535, 1586; I Lianos, "'Judging Economists": Economic Expertise in Competition Law Litigation: A European View' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010) 189.

<sup>27</sup> Brewer, *ibid*.

<sup>28</sup> Static efficiency occurs when marginal production costs are minimised (productive efficiency) or when the goods and services are allocated to the uses in which they have the highest value (allocative efficiency).

<sup>29</sup> Dynamic efficiency relates to demand in investment and innovation.

<sup>30</sup> The mandatory unbundling provisions are enshrined in Section 251(d) of the US Telecommunications Act of 1996. In the EU see Regulation (EC) 2887/2000 (n 22).

<sup>31</sup> For a discussion see *AT&T Corp v Utilities Board*, 525 US 366 (1999).

<sup>32</sup> L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353.

<sup>33</sup> *ibid* 394.



A perfect example of a polycentric task is how to set the appropriate regulatory access price; that is, the price under which competing firms will have access to essential inputs (eg the electricity transmission network) provided by the incumbent. In access pricing the regulator has to strike a balance between the divergent interests of the new entrants, the incumbent and ultimately the consumers. The best outcome of this balancing exercise demands comprehension of a highly complex range of cause–effect relationships. First, there is a distributional concern. Pricing at marginal cost maximises efficiency, but does not compensate the incumbent for his fixed costs related to investments in the network. Secondly and relatedly, there is a dynamic efficiency concern. In other words, the regulator has to ensure that the method employed will also contribute to the long-term interest of the consumer, the encouragement of technological innovation, and the growth and viability of the sector at issue. However, little guidance is provided in the agencies' governing statutes in such cases, hence allowing the regulators a large measure of policy discretion to balance the competing interests at stake.<sup>34</sup>

Fuller argued that polycentric disputes are inherently unsuited for adjudication and thus best resolved through managerial discretion or through negotiation and contract,<sup>35</sup> or left to the forces of the market.<sup>36</sup> Nonetheless, Fuller accepted that polycentric elements are present in all problems resolved by adjudication. What becomes important is knowing when 'the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached'.<sup>37</sup> It follows that the polycentric dimension of regulatory disputes does not necessarily imply the removal of the court's supervision altogether (non-justiciability), but may warrant a special weight to be accorded to the economic assessments of the regulatory agency. This, however, as we shall see, presupposes a case-by-case assessment of the factors that may attenuate the polycentric dimension of the dispute in question, thus making it amenable to the adjudicative process.<sup>38</sup>

If the regulatory and adjudicative institutional process are imperfect alternatives, as this article contends, the challenges posed by economic evidence in regulatory disputes should be addressed by a comparative institutional analysis of these imperfect alternative choices to select the least imperfect one. However, this is not as simple as it may sound. The examination of the different avenues for challenging regulatory decisions in the US and the UK, undertaken in the following section, will reveal that a plethora of imperfect decision makers are involved in the regulatory and adjudicative process.

<sup>34</sup> See eg Telecommunications Act of 1996, Preamble (n 23); Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/51, art 13.

<sup>35</sup> Fuller (n 32) 400.

<sup>36</sup> *ibid* 398.

<sup>37</sup> *ibid* 397.

<sup>38</sup> See J King, 'The Pervasiveness of Polycentricity' [2008] PL 101.

### 3. *'Imperfect Alternatives': Avenues for Challenging Regulatory Decisions in the US and the UK*

The US and the UK differ radically with respect to the procedures available for the review of economic evidence enshrined in regulatory decisions. First, in the case of the US, federal regulatory agencies' decisions are reviewed by means of judicial review only. In contrast, in the UK, the routes of both judicial review and merits review are offered to challenge sector-specific regulators' decisions. Secondly, as will be shown, in the US, review of economic evidence is 'internal', meaning that 'it takes place within the institution in which the original decision maker was located at the time the decision was made'.<sup>39</sup> In contrast, in the UK it is usually 'external' to the regulatory agency, as it takes place in a different institution, the Competition and Markets Authority (CMA).<sup>40</sup> Finally, while the US has resisted the idea of establishing specialised courts for the resolution of regulatory disputes, in the UK a specialist tribunal, the Competition Appeal Tribunal (CAT),<sup>41</sup> has been established, charged with the review of economic evidence implicated in regulatory disputes.

#### A. *The Process for Regulatory Appeals in the US*

The US has adopted an administrative litigation model for the review of economic evidence, which reflects its long tradition of administrative adjudication in the regulation of natural monopolies. To explain this further, when a decision involving economic evidence made by the FERC or the FCC is challenged or disputed, a common pattern is for the decision to be reviewed first by an adjudicative institution embedded in the regulatory agency, that of the Administrative Law Judge (ALJ). Crucially, the ALJ is functionally separated from the investigatory and prosecution arm of the agency.

The administrative litigation model is very similar to court adjudication, 'as it involves the participation of the affected interests in the decision-making process through proofs and reasoned arguments'.<sup>42</sup> The administrative hearing is trial-like, with testimony and evidence presented by trial staff, such as attorneys and trial staff, who assist the ALJ and participate in the hearings as impartial representatives of the public interest. They may also serve as expert witnesses.<sup>43</sup> The opportunity for oral testimony by witnesses and the opportunity for cross-examination enable the agency to test its factual record.

The process is governed by the provisions of the APA, a default procedural framework governing federal regulatory policy making. The ALJ's initial or recommended decision is final, subject to a *de novo* review or appeal by the

<sup>39</sup> P Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010) 7.

<sup>40</sup> Enterprise and Regulatory Reform Act 2013, ss 25–8.

<sup>41</sup> Established by the Enterprise Act 2002.

<sup>42</sup> Fuller (n 32) 365.

<sup>43</sup> See 18 CFR 385.102(b).

regulatory agency itself—either by the commissioners or by members of the agency’s governing body. Agency heads thus perform a ‘second pair of eyes’ review of the decisions and are free to substitute their judgment for that of the ALJ on questions of law, fact and discretion.<sup>44</sup> If the regulatory agency affirms the original decision or varies it in a way that does not satisfy the affected party, that party may seek external review of the decision in the federal courts on the various grounds of review listed in the APA. Federal courts are limited to the record produced by the agency itself and refrain from a *de novo* examination of the facts. It is not for the courts to substitute their views for that of the agency, nor to provide a reasonable basis for the agency’s action.<sup>45</sup>

Although, in principle, all of the US circuit courts can hear petitions for review of federal regulatory agencies, the Court of Appeals for the District of Columbia (DC Circuit) merits special attention. Technically speaking, the DC Circuit is a regional court staffed by judges from all over the US. However, its location, right in the heart of the federal’s government capital, and its exclusive jurisdiction over a variety of legal challenges to administrative law action have rendered it a ‘semi-specialised’ court.<sup>46</sup> Although the DC Circuit is the court of final resort for most cases, there is always the possibility of further appeal to the Supreme Court. The Supreme Court enjoys certiorari jurisdiction in reviewing lower courts’ judgments *de novo*.

## B. The Process for Regulatory Appeals in the UK

In line with the principles of subsidiarity and national procedural autonomy,<sup>47</sup> the UK enjoys ample discretion in determining the means available for challenging regulatory decisions—subject, of course, to the twin principles of equivalence and effectiveness.<sup>48</sup> While, in the original legislation establishing the utility regulators, regulatory decisions could only be challenged by way of judicial review before the generalist High Court and on limited grounds (ie illegality, irrationality or procedural impropriety), today the routes of both appeal and judicial review are available. In fact, the introduction of statutory rights of appeal in the late 1990s have gradually led to the marginalisation of judicial review as the primary means to challenge regulatory decisions.<sup>49</sup> Furthermore, the establishment of the specialist CAT has seen the High Court largely replaced as the primary venue for hearing such challenges. Contrary to

<sup>44</sup> APA, 5 USC § 557(b).

<sup>45</sup> *Universal Camera Corp v NLRB*, 340 US 474 (1951).

<sup>46</sup> JM Golden, ‘The Federal Circuit and the DC Circuit: Comparative Trials of Two Semi-Specialised Courts’ (2010) 78 Geo Wash L Rev 553.

<sup>47</sup> The principle of subsidiarity is laid down in art 5, 3 TEU. The doctrine of national procedural autonomy has been developed by the CJEU in its case law, starting with Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>48</sup> See Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH/Telekom-Control-Kommission, and Mobilkom Austria AG* [2003] ECR I-5197, para 35.

<sup>49</sup> See Telecommunications (Appeals) Regulations 1999, SI 1999/3180L.

the ordinary courts, the CAT's bench combines legal and non-legal expertise in areas such as economics, business and accountancy.<sup>50</sup> Crucially, the CAT enjoys both statutory review (similar to common law judicial review) and statutory appeal jurisdiction (where it engages with the factual merits of the case). It can be argued that Parliament dealt with the limitations of judicial review by providing broader appeal rights to the CAT, which would not be subject to the restrictions of judicial review.

The process for the review of regulatory decisions is, however, largely inconsistent. Financially significant regulatory decisions for the investors and ultimately the consumers (eg price control decisions, licence modifications, references concerning non-licensable activities in the gas, electricity and energy code modifications appeals) can be appealed on the merits to the CMA.<sup>51</sup> The CMA enjoys broad access to epistemic competence as well as access to a pool of investigators, including Utilities Panel members.<sup>52</sup> Furthermore, its in-depth inquisitorial approach allows for a better appreciation of the underlying issues in price control and licence modification cases than the CAT's adversarial approach. In the energy appeal process, as a result of the introduction of the EU Third Energy Package reforms,<sup>53</sup> standing rules have been widened and all licensees (eg network companies, generators or retailers) and consumer representative bodies (eg Citizens Advice) have a right of appeal in relation to licence decisions that materially affect them.<sup>54</sup>

In contrast, OFCOM's licencing decisions under the Communications Act 2003 are subject to an appeal on the merits before the CAT by any party affected by the decision. This full appeal on the merits is due to the requirement of the EU Framework Directive for electronic communications.<sup>55</sup> A further appeal on point of law can be brought to the Court of Appeal on behalf of a party or anyone else with sufficient interest.<sup>56</sup> However, in the case where an appeal raises a price control matter, this is hived off by the CAT and referred to the CMA for determination 'on the merits'. In such cases, participation in the CMA proceedings is limited to the parties to the case, the appellant, the regulator and any interveners who are admitted by the CAT.

Finally, where the sectoral regulators exercise concurrent powers with the CMA under the Competition Act 1998, there is a right of appeal on the merits to the CAT and then on a point of law to the Court of Appeal. In such cases,

<sup>50</sup> Enterprise Act 2002, sch 2, para 1(1); Competition Appeal Tribunal, Guide to Proceedings (October 2005).

<sup>51</sup> Gas Act 1986, s 23B-G; Electricity Act 1989, s 11C-H; Water Industry Act 1991, ss 14-16.

<sup>52</sup> Utilities Act 2000, s 104(1) and (2).

<sup>53</sup> The Third Energy Package comprises two Directives and three Regulations <[http://ec.europa.eu/energy/gas\\_electricity/legislation/third\\_legislative\\_package\\_en.htm](http://ec.europa.eu/energy/gas_electricity/legislation/third_legislative_package_en.htm)> last accessed 17 September 2015.

<sup>54</sup> See eg CC02/07, *E.ON UK Plc and GEMA and British Gas Trading Limited*—Decision and Order of the Competition Commission (10 July 2007).

<sup>55</sup> See Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, art 4, 1.

<sup>56</sup> Communications Act 2003, s 192.

the CAT's powers extend to substituting the decision for that of the regulator. In contrast, challenges against penalties and companies' licence conditions are heard by the High Court on grounds similar to those of judicial review.<sup>57</sup>

This brief excursion into the avenues for challenging regulatory decisions revealed that the various decision makers involved in the regulatory and adjudicative process differ significantly regarding their degree of economic expertise in regulatory matters and the extent and quality of participation of affected interests. The latter feature is of particular importance in the case of polycentric disputes. Finally, they are constrained by different procedures for the assessment of economic evidence. Hence, a comparative institutional competencies approach to the appropriate scope of review of economic evidence would necessarily have to take into account factors other than the relative economic expertise of the decision makers. Those factors would include fact-finding competence, evidence-gathering tools, access to epistemic competence, the standard of review (ie merits review or judicial review) applied and the standing rules in place. Prior to exploring this proposition further, it is necessary to first examine the doctrinal positions advanced in the US and the UK for the substantive review of regulatory agency discretion.

#### 4. *Substantive Review of Regulatory Discretion in the US and the UK*

A well-documented divergence exists in the doctrinal positions governing the substantive review of regulatory agency discretion in the US and the UK, reflected in the high-intensity 'hard look' review and the low-intensity rationality review, respectively. This divergence is attributed to the broader historical, constitutional and institutional differences between the two jurisdictions.<sup>58</sup> To give one example, the US Constitution's separation of powers and the related difficulty of applying the system of checks and balances to the 'fourth branch of government'<sup>59</sup> have generated far more institutional tensions between the courts and the administrative agencies than in the UK, where agencies are controlled by a single Executive.

Furthermore, these standards of review are inevitably influenced by the judges' assumptions about the place of judicial review in their constitutional order, as well as by the perception of their role in the regulatory process. For instance, as will be shown, the very promulgation of the 'hard look' review in

<sup>57</sup> With the exception of appeals against penalties for breach of the transmission constraint licence condition under the Energy Act 2010, which are heard by the CAT; *BT and Others v OFCOM* [2012] EWCA Civ 1002.

<sup>58</sup> For the most recent analysis see EC Ip, 'Taking a "Hard Look" at "Irrationality": Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) 34(3) OJLS 481.

<sup>59</sup> JO Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (CUP 1978) ch 2.

the early 1970s illustrates that federal courts had assumed a corrective role for the alleged failures of the regulatory process to regulate in the public interest.<sup>60</sup> In contrast, the irrationality review in the realm of utilities regulation emerged inter alia as a reaction to the apparent incapacity of the courts to deal with the complexity of the regulators' economic assessments following the privatisation of utilities.

This section will take a closer look at the evolution of these divergent doctrinal positions and their application in regulatory disputes.

### *A. The Scope and Intensity of Substantive Review of Regulatory Discretion in the US*

As a general rule, the discretionary assessments of the FERC and the FCC are, at the minimum, subject to the 'arbitrary, capricious [or] abuse of discretion' test of the APA.<sup>61</sup> Nonetheless, the availability and scope of review are largely determined by whether the regulatory agency's action involves rule making or adjudication, according to the distinction firmly embedded in the APA.

Rule making resembles legislative action, whereas adjudication is similar to court proceedings. Two kinds of rule making are envisioned by the APA: formal and informal. Formal rule making refers to 'rules required by the statute to be made on the record after an opportunity for an agency hearing'.<sup>62</sup> Informal rule making, otherwise known as 'notice-and-comment rule making', is triggered by a notice to the public of the 'subjects and issues involved',<sup>63</sup> followed by an opportunity for outsiders to provide comments or objections to the proposed rule. Generally, informal rule making generates rules made pursuant to congressionally delegated authority. The legislative rules, if valid, operate like a statute.

Adjudication is defined broadly in the APA as a 'process for the formulation of an order'.<sup>64</sup> An order binds only the party to the proceedings, but some orders, such as those issued at the conclusion of the FERC's adjudication, operate as precedent.<sup>65</sup> Both formal rule making and formal adjudication require prescribed hearing procedures with the aim of creating a factual empirical basis upon which the agency will form its decision. Formal adjudication, however, affords a more limited class of persons—often the parties—to present evidence and to have the opportunity for cross-examination.<sup>66</sup>

<sup>60</sup> See TW Merrill, 'Capture Theory and the Courts: 1967–1983' (1997) 72 Chicago-Kent L Rev 1039, 1056.

<sup>61</sup> Above n 12.

<sup>62</sup> 5 USC § 553(c).

<sup>63</sup> 5 USC § 553(b)(3).

<sup>64</sup> 5 USC § 551(7).

<sup>65</sup> J Rossi, 'Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry' (1994) Wisconsin L Rev 763, 833.

<sup>66</sup> 5 USC §§ 556–7.



Although the APA envisions two kinds of routes that the agency may follow to effectuate its statutory mandate, in reality the latter is free to select from a wider set of policy-making tools.<sup>67</sup> The FERC, for example, is authorised to promulgate legislative rules, conduct administrative adjudication and/or initiate judicial enforcement. It can be argued that, as a general pattern, the FCC relies heavily on rule making,<sup>68</sup> whereas the FERC relies on both adjudication and legislative rules.<sup>69</sup> Crucially, rate making for electric and gas utilities is classified as rule making, but is conducted very much like formal adjudication before an ALJ.<sup>70</sup>

Rules made on the 'record' are subject to the 'substantial evidence standard'.<sup>71</sup> The same standard applies to an agency's factual findings in the course of adjudication, which will be assessed to see whether it is based on the 'whole record'.<sup>72</sup> It is important to stress that in such cases federal courts rarely undertake a *de novo* examination of the economic facts, as these have been largely established in the course of the complex fact-finding process undertaken by the ALJ. Indeed, the records of the FCC and the FERC cases illustrate that courts increasingly review agencies' action under the arbitrary and capricious test of the APA deferring to agency findings of fact, provided they are supported by substantial evidence on the record.<sup>73</sup>

However, neither the text nor the legislative history of the APA clarifies the intensity of the arbitrary and capricious test. Over time, it has given rise to both light-touch review and intrusive review of administrative action; the latter commonly referred to as 'hard look' review. Developed by the DC Circuit in the late 1960s and early 1970s in response to agencies' turning to informal rule making as a means of policy making and to the belief in 'agency capture', 'hard look' review demanded an intrusive review of the agency's action. In the legal academy, US administrative law scholars supported this position by advocating a more 'stringent judicial review'<sup>74</sup> of the regulatory agency's actions, which would be less deferential to political outcomes,<sup>75</sup> as well as a more intrusive judicial review of agency rule making so as to combat agency capture.<sup>76</sup> The doctrine also required that agencies satisfy the court that they had considered all of the dimensions of the matter before it and that they had engaged in

<sup>67</sup> EM Magill, 'Agency Choice of Policymaking Form' (2004) 71 U Chicago L Rev 1383.

<sup>68</sup> MC Dollarhide, 'Surrogate Rule Making: Problems and Possibilities under the Administrative Procedure Act' (1988) 61 S Cal L Rev 1017, 1032.

<sup>69</sup> Rossi (n 65).

<sup>70</sup> See *Shell Oil Co v FPC*, 520 F2d 1061 (5th Cir 1975). See further RJ Pierce Jr, 'The Choice between Rulemaking and Adjudication for Formulating and Implementing Energy Policy' (1979) 30 Hastings LJ 1.

<sup>71</sup> 5 USC § 706(2)(E).

<sup>72</sup> 5 USC § 706.

<sup>73</sup> *American Gas Association v FERC*, 593 F3d 14, 19 (DC Cir 2010); *Achernar Broad v FCC*, 62 F3d 1441, 1445 (DC Cir 1995); *Covad Communications Committee v FCC*, 450 F3d 528, 531, 533–4 (DC Cir 2006).

<sup>74</sup> D Farber and P Frickey, 'The Jurisprudence of Public Choice' (1987) 65 Texas L Rev 873, 908.

<sup>75</sup> E Rubin, 'Public Choice in Practice and Theory' (1993) 81 Cal L Rev 1657, 1670; S Rose-Ackerman, 'Judicial Review and the Power of the Purse' (1992) 12 Int'l Rev L & Econ 191.

<sup>76</sup> CR Sunstein, 'Interest Groups in American Public Law' (1985) 38 Stan L Rev 29, 61–3.

reasoned decision making when claiming discretion.<sup>77</sup> Additionally, they should justify departures from past policies and allow effective participation in regulatory decision making by a broader range of stakeholders. The Supreme Court endorsed the doctrine in the *State Farm* case,<sup>78</sup> stating that a reviewing court ought to test the quality of the agency's reasoning process as to whether 'the decision was based on a consideration of the relevant factors'; whether 'there has been a clear error of judgment'; and whether:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>79</sup>

Hence, the Court embraced not only the procedural and but also the substantive dimensions of the 'hard look' review.

In the realm of utilities regulation, the 'hard look' review has been applied in judicial review of the FERC's and the FCC's exercise of policy-making discretion in light of a technical or economic record, such as the one that exists in rate-setting cases. For example, in reviewing the FCC's and the FERC's exercise of discretion in such cases, the federal courts employ a rationality-type review to examine whether the agency took into account 'the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made'.<sup>80</sup> Rate setting is an inherently complex process that involves economic, technical and policy assessments.<sup>81</sup> Although judges routinely hold that the implementation of the legislative requirement of 'just, reasonable and non-discriminatory rates' involves 'policy judgements that lie at the core of the regulatory mission',<sup>82</sup> the application of the 'hard look' review has enabled federal courts to reverse, vacate or remand a number of the FERC's orders on the grounds that the latter failed to engage in 'reasoned decision making' or failed to explain its underlying policy;<sup>83</sup> it departed from prior policy<sup>84</sup> or precedent;<sup>85</sup> and it refused to consider new evidence.<sup>86</sup>

<sup>77</sup> See *Citizens to Preserve Overton Park v Volpe*, 401 US 402 (1971).

<sup>78</sup> *Motor Vehicle Mfrs Ass'n v State Farm Mut Auto Ins Co*, 463 US 29 (1983) (*State Farm*).

<sup>79</sup> *ibid* para 43.

<sup>80</sup> *Midwest ISO Transmission Owners v FERC*, 373 F3d 1361, 1368 (DC Cir 2004) (quoting *State Farm*).

<sup>81</sup> *Alcoa v FERC*, 564 F3d 1342 (DC Cir 2009).

<sup>82</sup> *Town of Norwood v FERC*, 962, F2d 20, 22 (DC Cir 1992); *Entergy Services Inc v FERC*, 319 F3d 536, 541 (DC Cir 2003).

<sup>83</sup> *Transcontinental Gas Pipe Line Corp v FERC*, 54 F3d 893 (DC Cir 1995); *Sithe/Independence Power v FERC*, 165 F3d 944 (DC Cir 1999); *Michigan Public Power Agency v FERC*, 405 F3d 8 (DC Cir 2005).

<sup>84</sup> *Louisiana Public Service Commission v FERC*, 184 F3d 892, 230-1 (DC Cir 1999).

<sup>85</sup> *Williston Basin Interstate Pipeline Co v FERC*, 165 F3d 54 (DC Cir 1999).

<sup>86</sup> *Port of Seattle, Washington v FERC*, 499 F3d 1016 (9th Cir 2007).



## B. *The Scope and Intensity of Substantive Review of Regulatory Discretion in the UK*

The early case law, in the wake of utilities privatisation, suggests that the low-intensity rationality review applied to the regulators' discretionary assessments was informed by constitutional considerations as well as by the apparent incapacity of the courts to deal with the complexity of economic appraisals. Substantive decisions were challenged under the standard of *Wednesbury* unreasonableness. Under this test of review, courts could set aside the conclusion reached by a public authority entrusted by Parliament with discretion on a matter if this decision was wholly absurd—that is, it is a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had his mind to the question to be decided could have arrived at it'.<sup>87</sup> It was thought that limiting substantive review in this way would prevent courts from entering into a constitutionally forbidden territory. The deferential posture was further justified by the regulator's special knowledge and expertise in regulatory matters.<sup>88</sup> Thus, in the *Cellcom*<sup>89</sup> case concerning licence modifications in telecoms, Lightman J strongly suggested that:

Where the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment... If (as I have stated) the court should be very slow to impugn decisions of fact made by an expert body and experienced decision-maker, it must surely be even slower to impugn his educated prophesies and predictions for the future.<sup>90</sup>

The judicial reluctance extended to the regulator's findings of fact, which formed the basis of his discretionary judgment. In a number of cases, English courts have held that the existence or non-existence of fact should be left to the judgment or discretion of the decision maker.<sup>91</sup>

The input into the courts' reasoning of the above-mentioned considerations led to a long-lived harmonious relationship between the judges and the regulatory agencies: the judges would focus on the *process* of regulatory decision making, whereas the agencies would focus on the *substance* thereof. The absence of a proportionality test for substantive review that would require the courts 'to assess the balance the decision-maker has struck',<sup>92</sup> paying attention to the 'relative weight of interests and considerations',<sup>93</sup> subjected the regulatory agencies' decisions only to the 'monolithic' *Wednesbury* test of

<sup>87</sup> *CCSU* (n 15).

<sup>88</sup> *R (London and Continental Stations and Property Ltd) v The Rail Regulator* [2003] EWHC 2607 (Admin).

<sup>89</sup> *R v Director General of Telecommunications, ex p Celcom Ltd and Others case* [1999] ECC 314, para 29.

<sup>90</sup> *ibid* para 26.

<sup>91</sup> *R v Independent Television Commission (ITC), ex p Virgin Television Ltd* [1996] EMLR 31.

<sup>92</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 5.

<sup>93</sup> *ibid*.

extreme unreasonableness—a test that is very difficult for the claimant to satisfy.<sup>94</sup> The economic evidence enshrined in regulatory decisions was largely immune from judicial scrutiny, giving rise to a controversy over limited regulatory accountability. The judicially created boundaries of ‘no-go’ areas of review allowed regulators to operate largely unchecked; rarely did they state reasons or provide clear criteria for their decisions.<sup>95</sup>

However, the force of low-intensity rationality review seems to have dwindled in recent years, especially in light of constitutional and jurisprudential developments that have allowed a more demanding judicial scrutiny than traditional *Wednesbury* review. Such developments are better captured in the notion of a ‘multi-streamed jurisdiction’,<sup>96</sup> a term employed to denote that judicial review now encompasses not only common law principles, but also relevant applications of EU law and of the European Convention of Human Rights (ECHR).

Hence, claimants wishing to challenge the regulators’ economic assessments may demand a more stringent review of agency’s discretion based, inter alia, on the ‘European’ proportionality head of review.<sup>97</sup> *BT v OFCOM*<sup>98</sup> is a case in point. In this case, the claimants argued that judicial review of the CMA’s price control determinations under section 193(7) of the Communications Act 2003 should encompass a ‘European’ proportionality head of review, which would be more stringent than the ‘English’ standard of review. The CAT, however, refused to do so in ‘the absence of an authoritative statement made that as a general proposition, English law has adopted proportionality as an independent ground of review’.<sup>99</sup>

Similarly, in the *T-Mobile*<sup>100</sup> case, the general principle of EU law relating to effective judicial protection was successfully invoked by OFCOM in litigation concerning the auction of spectrum licences. The incumbents tried to substitute judicial review proceedings before the High Court with the lengthier proceedings before the CAT, relying on the requirement of the Framework Directive for electronic communications for an ‘effective appeals mechanism’.<sup>101</sup> The Court of Appeal stressed the obligation on a national court ‘to

<sup>94</sup> *R v Trade and Industry Secretary, ex p Lonrho plc* [1989] 2 All ER 609, [1989] 1 WLR 525 [1989] BCC 63; *Cityhook Ltd and another, R (on the application of) v Office of Fair Trading and others* [2009] EWHC (Admin) 57, paras 136 and 165.

AQ3.<sup>95</sup> C Veljanovski, ‘The Regulation Game’ in C Veljanovski (ed), *Regulators and the Market* (The Institute of Economic Affairs 1991) 17.

<sup>96</sup> R Rawlings, ‘Modeling Judicial Review’ (2008) 61 CLP 95, 96.

<sup>97</sup> See *R (On the Application of Lumsdon and Others) v Legal Services Board* [2015] UKSC 41.

<sup>98</sup> *BT v OFCOM* [2012] CAT 11.

<sup>99</sup> *ibid* para 128.

<sup>100</sup> *T-Mobile (UK) Ltd v Office of Communications* [2008] EWCA Civ 1373.

<sup>101</sup> *ibid*. The principle of effective judicial protection is elaborated in Case C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271.

adapt its procedures as far as possible to ensure Community rights are protected',<sup>102</sup> and ruled that the High Court could also adapt its procedure to ensure a variable intensity of review.<sup>103</sup>

Furthermore, the provisions of the EU Charter of Fundamental Rights and Freedoms that codifies procedural rights (eg right to access to justice and fair trial) and substantive rights (ie the right to property) may also constitute grounds for annulling regulatory decisions implementing EU law.

Finally, the incorporation of the ECHR into English law by the Human Rights Act 1998 (HRA) has also opened up new attractive routes for firms and individuals wishing to challenge regulatory decisions. For example, in *Marcic*<sup>104</sup> a claim was brought against a sewage provider in the tort of nuisance and under the HRA for breaches of article 1 of the First Protocol, providing for the peaceful enjoyment of possessions, and article 8, providing the right to respect for one's home, for repeated flooding of the claimant's property. The House of Lords rejected the claim on the grounds that there was a statutory scheme for regulating the water industry, which struck a reasonable balance between Convention rights and the interests of the community as a whole. It was thus the regulator's role to decide on the application of Convention rights in this area of economic regulation.<sup>105</sup>

A further attractive area is that of the recovery of damages under section 9(3) of the HRA for breach of Convention rights. The *Infinis*<sup>106</sup> case is a case in point. The Court of Appeal upheld the award of damages based on an infringement of article 1 of the First Protocol. OFGEM was held to have made an error of law when interpreting the statutory regime for subsidising renewable energy that resulted in *Infinis* being refused Renewables Obligation Certificates (ROCs), a financial benefit to which it was legally entitled.<sup>107</sup> Given that, at the time of trial, the ROCs were out of date, the judge decided that the claimant would not derive just satisfaction from quashing and mandatory orders alone. No claim in private law was available to it. Indeed, the only means by which *Infinis* could recover what it was entitled to under the statutory scheme was through the award of damages.<sup>108</sup>

The foregoing analysis revealed that although the doctrinal positions presupposed the institutional advantages and disadvantages of courts when determining the degree of deference to regulatory decisions, they have since evolved to include varying intensities of review. There is, however, still room for these to become aligned with the institutional and procedural framework governing the regulatory appeals process. For instance, how would the doctrine

<sup>102</sup> *ibid* para 22.

<sup>103</sup> *ibid* para 23.

<sup>104</sup> See eg *Peter Marcic v Thames Water Utilities Limited* [2002] EWCA Civ 65.

<sup>105</sup> *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66.

<sup>106</sup> *R (on the application of Infinis Plc) v Ofgem* [2011] EWHC 1873 (Admin).

<sup>107</sup> *ibid* para 103.

<sup>108</sup> *ibid* para 106.

of deference to agency's expertise, as applied by the UK generalist High Court, be accommodated in a specialist tribunal, such as the CAT? In such a case, blanket deference on the basis of the regulator's expertise is unconvincing, as it is rooted in the anachronistic assumption that the regulator is the only one who possesses the special knowledge. Furthermore, one may question whether the generalist judge is institutionally well suited for strict policy review of such disputes, given his informational limitations and political insulation. Will a 'hard look' style of review lead to a better administrative policy, or will it discourage the agency from acquiring policy-relevant expertise? The next section will discuss how a balance of comparative institutional competencies approach to deference may overcome these issues and ensure that substantive review of regulatory discretion becomes attuned to the nature of economic evidence and the polycentric dimension of regulatory disputes.

## *5. A Balance of Comparative Institutional Competencies Approach*

At their most basic, comparative institutional competence considerations are built on the assumption that one branch of government is better at performing a specified function than another. As used here, a balance of comparative institutional competence approach to deference envisions that, when faced with the agencies' discretionary economic assessments, courts should weigh their relative institutional advantages and disadvantages in resolving such issues against those of the regulators, before deciding on the appropriate amount of deference to accord to the agency's assessments.

### *A. The Comparative Institutional Disadvantages of Courts*

As compared to the regulatory agencies, generalist courts suffer from a number of institutional disadvantages in assessing the different manifestations of economic evidence in regulatory disputes. These include: (i) lack of economic expertise; (ii) limited access to information; (iii) lack of requisite institutional legitimacy, especially in addressing polycentric disputes and questions connoting broad policy considerations; and (iv) susceptibility to 'minoritarian' bias.

#### *(i) Lack of economic expertise*

One of the most obvious institutional disadvantages of ordinary courts relates to their lack of expertise in regulatory matters. Judges sitting on such courts do not appear to have the special skills and expert knowledge necessary to assess economic evidence; nor can they easily acquire such skills. For instance, they do not possess cross-disciplinary expertise in economics and/or business and accountancy, as members of the CAT do, and they deal with a much wider

spectrum of disputes than just regulatory disputes. The regulatory agencies, on the other hand, have in recent years invested heavily in economic expertise. On both sides of the Atlantic, professional experts drawn from the fields of economics, statistics and finance form part of the regulatory agencies' in-house expertise.<sup>109</sup> Furthermore, economists often hold key positions in the agencies and most utility regulators have a panel of external economic consultants to complement the in-house economic skills.<sup>110</sup> Finally, the fact that the agency is endowed by statute with primary responsibility for the regulation of the sector in question coupled with the legislative requirement of evidence-based policy making strengthens its incentives to employ and rely on economic expertise.<sup>111</sup>

The court's lack of economic expertise provides a basis for judicial deference to the agency's economic assessments grounded on the latter's 'epistemic authority'.<sup>112</sup> In such a case, the judge acknowledges its 'epistemic deficit'<sup>113</sup> in evaluating the economic evidence enshrined in regulatory decisions and accords greater weight to the judgment of the agency, which is closer to the facts on the ground. Aileen Kavanagh refers to this kind of deference as 'substantial'<sup>114</sup> deference, in the course of which the judge recognises his 'institutional shortcomings'<sup>115</sup> in respect of an issue. It follows that failure on the part of the court to afford substantial deference to the regulator will lead to the court giving a wrong pronouncement on the issue at stake. Substantial deference, in turn, differs from the 'minimal' deference that is owed to the agency for constitutional reasons.<sup>116</sup>

## (ii) *Limited access to information*

Another comparative institutional disadvantage of the courts is their limited access to information that is relevant to the dispute in question. Judges depend for their information on the evidence that is put before them in a case. In other words, they are situated decision makers, called to decide upon regulatory disputes on an ad hoc basis. This is especially the case in the context of adversarial proceedings, whereby the adjudicator is informed solely by the litigating parties and thus is significantly insulated from the whole spectrum of relevant information. The regulatory agency, on the other hand, has a continuous involvement in the administration of the sector it supervises and enjoys broad access to information regarding the problems and characteristics thereof. This, in turn, may warrant a

<sup>109</sup> See L. Schrefler, *Economic Knowledge in Regulation: The Use of Expertise by Independent Agencies* (ECPR Press 2013).

<sup>110</sup> Notable economists served as DG's in the UK's regulators following privatisation. Chief Economists have been appointed in all US and UK utility regulators.

<sup>111</sup> RC Taylor, 'Embedding Evidence Based Policy Making in Regulatory Organisation: A Case Study of the UK Office of Communications—OFCOM' (University of Oxford 2009) 125–5.

<sup>112</sup> See P Horwitz, 'Three Faces of Deference' (2008) 83 Notre Dame L Rev 1061, 1079–90.

<sup>113</sup> Brewer (n 26) 1586.

<sup>114</sup> A Kavanagh, 'Deference or Defiance' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 191.

<sup>115</sup> *ibid* 139, 192.

<sup>116</sup> *ibid*.

high degree of deference to the regulator's assessments because of his superior institutional capacity to gather and assess relevant information.

There are several ways by which the regulatory agency can acquire such information. First, it can acquire the information during the consultation period that precedes the promulgation of a new rule. All UK utility regulators enjoy statutory information-gathering powers,<sup>117</sup> which they may use if they believe it is appropriate to do so. Both the consultation and the pre-consultation process allow the gathering of relevant market data and the exchanges of views with stakeholders and affected interests, and therefore enable epistemic communities representing different values to be represented in the regulatory process. This, in turn, allows a broader representation of the diverse set of consumer preferences, which strengthens the regulatory agency's capacity to assess the effects of its interventions. In the US, the main mechanism for the provision of relevant information is the 'notice-and-comment' rule-making process. The FERC, for example, frequently solicits comments from regulated industries, competitors and interested citizens and organisations, collectively referred to as interest groups.<sup>118</sup>

Secondly, the regulatory agency collects relevant information during the enforcement stage. Evidence-gathering tools are important in this respect. For example, in the US context, the APA has endorsed fairly liberal standards for the admissibility of evidence in formal proceedings,<sup>119</sup> whereas agencies are free to complement the standards of the APA with those found in the Federal Rules of Civil Procedure or in the Federal Rules of Evidence. Additionally, trial staff who participate in the administrative litigation process possess a wide array of tools, from data requests and dispositions to inspections and interrogatories, to collect relevant information and ensure that the evidentiary record developed is adequate for decision making by the ALJ and the Commission. In the UK context, utility regulators and the CMA also possess wide evidence collection tools. OFCOM, for example, makes frequent use of its statutory information-gathering powers when exercising its regulatory functions.<sup>120</sup> To take another example, the CMA has the power to require the submission of additional information and clarification of the evidence during energy licence modification appeals. It may also commission expert evidence to help it interrogate evidence submitted by the appellant and by

<sup>117</sup> See eg Sections 135 and 136 Communications Act 2003.

<sup>118</sup> SW Yackee, 'Sweet-Talking the Fourth Branch: The Influence of Interest Groups Comments on Federal Agency Rulemaking' (2006) 16 J Public Adm Res Theory 103.

<sup>119</sup> APA, 5 USC § 556(d).

<sup>120</sup> Section 145 of the Communications Act 2003.

OFGEM. Parties are permitted to introduce new evidence insofar as the appeal body considers it is relevant to the issue before it.

(iii) *Lack of requisite institutional legitimacy*

As compared to regulatory agencies, both generalist courts and specialist tribunals lack the requisite institutional legitimacy to address cases involving broad policy considerations. As already discussed, in many contexts, regulatory agencies are required to trade off efficiency with equity considerations. This is because utilities regulation has diverse legitimate aims that are not solely guided by economic efficiency. For example, conditions for access to bottleneck services for new entrants are mainly driven by efficiency considerations related to the creation of a competitive marketplace. The provision of universal service, however, seeks to create equality of outcome by supporting the service to a legislatively defined category of users. This may involve the provision of a set of services to end users at prices that depart from those resulting from normal conditions. In such cases, a trade-off may arise in meeting the objective of promoting competition, while at the same time ensuring universal access to a set of services.

The regulatory agency may be said to enjoy superior institutional legitimacy in resolving such trade-offs, deriving, in turn, from its political accountability. This is because it is more informed on current political preferences than the judiciary, which makes it 'more likely to accurately reflect current enactable preferences than judicial estimates about what political forces would enact'.<sup>121</sup> The judiciary, on the other hand, is a 'counter-majoritarian',<sup>122</sup> institution composed of unelected judges who should not use their power of review to act contrary to the 'majority will' as expressed by representative institutions. Hence, an increased judicial interference with policy choices jeopardises the legitimacy of the institution. Especially in the UK context, institutional legitimacy considerations are strongly pronounced, in light of the principle of parliamentary sovereignty. Deference thus becomes relevant because there are constitutional reasons for granting authority over the judiciary to the regulatory agency.

The above-mentioned considerations should not, however, imply an abdication of the judicial role and function altogether. The judge will still have to assess the economic methodologies and considerations employed to support the agency's policy decision as well as the factors relevant to the regulators' determinations. The more expert the court or the tribunal in economics, the

<sup>121</sup> E Elhauge, 'Preference-Estimating Statutory Default Rules' (2002) 18 Colum L Rev 2027, 2129.

<sup>122</sup> A Bickel, *The Least Dangerous Branch* (Yale UP 1962); B Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' (2002) 112 Yale LJ 153.



greater the scrutiny that will be applied. The court, however, cannot pronounce on the right policy to be pursued because the agency has the legitimate authority to decide on this.

*(iv) Courts' susceptibility to 'minoritarian bias'*

Finally, contrary to what intuition would suggest, courts, and not solely regulatory agencies, can be susceptible to 'rent-seeking' influences. While the initial wave of public choice scholars addressed judges as operating outside the world of special interests,<sup>123</sup> the 'new school of public choice theory' increasingly brings the courts into the framework of public choice analysis.<sup>124</sup> For example, Frank Cross argues that '[c]ourts are simply another venue in which influence may be brought to bear upon government policy'.<sup>125</sup> He further discusses the variety of forms that the lobbying of courts can take, including 'text cases and forum shopping, *amicus curiae* participation, provision of expert witnesses, selective settlement and other techniques'.<sup>126</sup> Therefore, on this basis, the Olsonian tenets of interest group theory can also be ratified in the context of litigation, as narrow groups with greater economic stakes in regulatory issues will be more willing to devote time and resources to hiring the best lawyers and economic experts for their case, so as to be effectively represented in expensive litigation over regulatory disputes.<sup>127</sup> Ultimately, the judge might end up being captured by special interests.

Most worryingly, courts' susceptibility to 'minoritarian bias' might exacerbate the instances of tactical litigation. In other words, narrow groups may be encouraged to bring unmeritorious appeals with a view to hampering or obstructing the regulators' functions. In the UK, OFCOM voiced concerns about tactical litigation in the context of spectrum policy, with incumbent mobile operators allegedly attempting to hold up the auction for the 800 MHz/2.6 GHz spectrum by the threat of litigation.<sup>128</sup>

Strategic litigation may also be encouraged in the aftermath of the *Infinis*<sup>129</sup> judgment in the UK, which, as already discussed, introduced a novel action for damages for unlawful state actions in violation of the ECHR rights. Companies may now be willing to use human rights claims to seek more favourable forms of redress in judicial review proceedings.

<sup>123</sup> W Landes and R Posner, 'The Independent Judiciary in an Interest Group Perspective' (1975) 18 JLE 875.

<sup>124</sup> D Farber and AJ O'Connell, 'Introduction: A Brief Trajectory of Public Choice and Public Law' in D Farber and A O'Connell (eds), *Research Handbook in Public Law and Public Choice* (Edward Elgar 2010) 4.

<sup>125</sup> F Cross, 'The Judiciary and Public Choice' (1998) 50 Hastings LJ 355, 360.

<sup>126</sup> *ibid.*

<sup>127</sup> See M Olson, 'Interest Group Litigation in Federal District Courts: Beyond the Political Disadvantage Theory' (1990) 52 J Pol 854, 859; D Songer and R Sheehan, 'Who Wins on Appeal: Uppercups and Underdogs in the United States Courts Of Appeals' (1992) 36 AJPS 235.

<sup>128</sup> See E Richards (Chief Executive OFCOM), 'Spectrum in an Age of Innovation—Speech for ECTA Regulatory Conference 2011' (2011) 4 <<http://media.ofcom.org.uk/files/2011/12/SPECTRUM-POLICY-SPEECH-291111.pdf>> last accessed 17 September 2015.

<sup>129</sup> See n 106.



### B. Some Implications of the Suggested Approach in Polycentric Disputes

The case of polycentric disputes epitomises the balance of institutional competencies approach in determining the appropriate scope of review of economic evidence. Such disputes do not solely involve the assessment of complex economic appraisals, but also exacerbate the difficulty of distinguishing who will be affected in the complex web of interdependent relationships.

Through negotiation and consultation, the regulator can acquire an informed view of the heterogeneous interests. For instance, in the course of designing the Revenue = Incentives + Innovation + Outputs (RRIO) price control mechanism, OFGEM sought to enhance the engagement of heterogeneous interests, such as consumer representatives, network users and companies. The authority also set up a Consumer Challenge Group for the latest RRIO-ED1 price control mechanism to act as a 'critical friend' to OFGEM to help ensure that the price control settlement is in the best interests of existing and future consumers.<sup>130</sup> Moreover, the regulatory process may better ensure the adequate representation of those groups that have traditionally been deemed vulnerable to 'majoritarian bias', such as the disabled, the elderly and the chronically sick. In fact, the UK utilities regulators have a specific objective to promote the interests of such groups.<sup>131</sup> The adjudicative process, however, cannot take into account, to the same extent, the complex repercussions that may result from the establishment of a price control mechanism, nor secure the meaningful participation of all affected interests in court. Hence, it is the polycentric dimension of such disputes rather than the difficulty of courts in general to deal with price setting that may warrant the regulatory agency to have greater flexibility to assess the weight of the relevant issues at stake.

The CAT seems to acknowledge the polycentric element of certain regulatory disputes it is called upon to adjudicate. Prominent amongst these are the so-called 'termination rates disputes',<sup>132</sup> arising under OFCOM's dispute resolution powers.<sup>133</sup> In the *T-Mobile v Ofcom*<sup>134</sup> case, involving a number of disputes between British Telecom (BT) and mobile network operators concerning the level of charges for wholesale mobile call termination, the CAT stressed the necessity of a consultation process in enabling OFCOM to assess the effects of its interventions on a number of affected interests other than the parties to the disputes.<sup>135</sup> Such interests may be the wholesale customers of the parties to the dispute, who may be affected by the passing on of a price increase for investment and innovation purposes; or they may be the

<sup>130</sup> OFGEM Consumer Challenge Group <[www.ofgem.gov.uk/network-regulation-%E2%80%93-riio-model/riio-forums-seminars-and-working-groups/consumer-challenge-group](http://www.ofgem.gov.uk/network-regulation-%E2%80%93-riio-model/riio-forums-seminars-and-working-groups/consumer-challenge-group)> accessed 17 September 2015.

<sup>131</sup> The Electronic Communications (Universal Service) (Amendment) Order 2011 (SI 2011/1209); Gas Act 1986, s 4AA(2); Electricity Act 1989, s 3A2.

<sup>132</sup> *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12.

<sup>133</sup> Section 85 of the Communications Act 2003.

<sup>134</sup> See above (n 132).

<sup>135</sup> *ibid* para 188.

consumers who would be adversely affected from the higher prices passed on to BT's customers; hence consumer representative bodies should be advised.

### C. *Factors Attenuating the Comparative Institutional Disadvantages of Courts*

While institutional competence considerations are an influential factor in determining the appropriate scope of review of economic evidence, they are not decisive. The presence of a number of institutional realities may significantly attenuate the comparative institutional disadvantages of courts and hence the degree of deference accorded to the regulatory agency's economic assessments. This section will discuss a non-exhaustive list of such realities. Broadly, those relate to: (i) the court's specialisation in regulatory matters; and (ii) to the court's rules of procedure and its access to epistemic competence.

#### (i) *The court's specialisation in regulatory matters*

In the presence of a specialised tribunal, like the UK CAT, the deference accorded to the regulatory agency's economic determinations may be lower than where the assessment is made by a generalist court without any direct access at epistemic competence. The CAT itself has acknowledged that its familiarity with the statutory regime as well as 'the relevant expertise in its disposal may render the tribunal a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review a decision of a specialist regulator'.<sup>136</sup> One should also add that the legislative provision of the appeal rights on the merits also encourages the appellate institution to engage with economic arguments. In a number of cases, judges have not hesitated to engage in a forensic review of complex regulatory issues, to delve into the detail of the regulator's reasoning and eventually overturn his decision.<sup>137</sup>

Crucially, the institutional identity of the 'expert tribunal' has a direct impact on judicial behaviour. This is clearly illustrated in the early cases, where the CAT made a bold attempt to establish its image as a hyper-competent tribunal. A meaningful way to do so was to disengage itself from the restrictive doctrines governing judicial review of regulatory decisions developed by the High Court. For instance, in the *IBA Health* case,<sup>138</sup> the Court discarded the tautological arbitration of the *Wednesbury* review of unreasonableness, requiring a decision 'to be so unreasonable that no reasonable authority would have ever come to it',<sup>139</sup> in favour of the 'ordinary' and 'natural' meaning of the word.<sup>140</sup> The ordinary meaning of unreasonableness would enable a more wide-ranging

<sup>136</sup> *BSkyB v Competition Commission* [2008] CAT 25, para 61.

<sup>137</sup> See eg *Vodafone Ltd v OFCOM* [2008] CAT 22.

<sup>138</sup> *IBA Health Ltd v OFT* [2003] CAT 27.

<sup>139</sup> See above (n 14) 230.

<sup>140</sup> See *IBA Health Ltd* (n 138) para 225.

factual inquiry than that allowed under the restrictive *Wednesbury* test. Furthermore, though acknowledging that the ordinary principles of judicial review depend on the context in which they fall to be applied,<sup>141</sup> it went on to suggest that its constitution by Parliament as a specialist tribunal:

is in contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision-maker. For that reason we are unpersuaded that there is necessarily a direct ‘readover’ to section 120 from cases such as *Cellcom*, *Interbrew*, *T-Mobile*, and the *Rail Regulator* that have been cited to us.<sup>142</sup>

The court’s specialisation in economic evidence, through its repeated exposure to regulatory disputes, may also enhance its relative epistemic competence vis-à-vis the regulatory agencies. For example, in the US, the DC Circuit’s members achieve a certain degree of specialisation through their repeated exposure to regulatory cases. This kind of specialisation, which is owing to rules of venue and geographical patterns in litigation, is better captured in the notion of ‘subject matter’ specialisation. The mechanisms of opinion specialisation and case assignment may also ameliorate the institutional disadvantages of courts with respect to their lack of economic expertise. For instance, in his important study on the ‘Myth of the Generalist Judge’, Edward Cheng sheds empirical light on the de facto specialisation of the judge through the process of opinion assignment in the federal courts of appeals.<sup>143</sup> Finally, judges’ prior educational background or training in economics or, possibly, their prior experience in a regulatory agency of some kind may strengthen their capacity to deal with economic evidence.

(ii) *The court’s rules of procedure and its access to epistemic competence*

The court’s rules of procedure may enhance the information record of the courts concerning the dispute in question and allow for the better representation of affected interests. This, in turn, strengthens the institutional capacity of the court to deal with polycentric disputes. For instance, the CAT’s procedural rules favour an extensive—often forensic in nature—examination in respect of each aspect of the regulators’ findings of fact and expert analysis.<sup>144</sup> Prominent amongst these is the obligation on the part of the tribunal to ensure case management through active intervention.<sup>145</sup> Unlike the narrow scope of the duty of case management of the High Court,<sup>146</sup> there is wide scope for case

<sup>141</sup> *ibid* 220.

<sup>142</sup> *ibid*.

<sup>143</sup> EK Cheng, ‘The Myth of the Generalist Judge’ (2008) 61 *Stan L Rev* 519.

<sup>144</sup> See eg *Everything Everywhere Ltd v CC* [2012] CAT 11.

<sup>145</sup> CAT Guide to Proceedings (n 50) 3.4(ii).

<sup>146</sup> See CPR, rule 54 and the accompanying Practice Directions <[www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd\\_part54a](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd_part54a)>.

management under the CAT's Rules of Procedure.<sup>147</sup> Those rules, which are partly based upon those of the EU General Court<sup>148</sup> as well as on the Civil Procedure Rules,<sup>149</sup> crucially reserve to the CAT a central role in controlling the process, which is not inquisitorial but adversarial. In the course of the case management conference, which consists of a pre-hearing review serving a variety of functions (eg evidence gathering and fact finding), the tribunal may order the disclosure of documents or require the parties to particularise their pleadings.<sup>150</sup> There also exists an enforcement mechanism in the form of penalties for non-compliance with the court orders.<sup>151</sup>

Crucially, the CAT may consider new evidence, which was not submitted to the regulator before it made the decision which is being appealed,<sup>152</sup> or evidence that informed the regulator's decision during the administrative phase but that was made available to the parties either in the regulator's final decision or during the appeal process.<sup>153</sup> The CAT is also entitled to require the provision of evidence that was not before the regulator if it considers that the party who wishes to adduce it has shown good reason to justify it and that it is in the interests of justice to admit it.<sup>154</sup> For instance, the tribunal may consider an econometric study that had not yet been conducted when the regulator was forming his decision. *Vodafone v OFCOM*<sup>155</sup> is a case in point. On the basis of the witness statement submitted on behalf of the intervener H3G, the CAT decided that OFCOM's decision to mandate direct routing of calls to ported numbers was not robust and should be overturned.

The CAT considers its ability to consider new evidence as conferring 'a broad discretion to the tribunal regarding the admission or exclusion of evidence which discretion is coloured by the nature of the appeal that is being heard'.<sup>156</sup> The circumstances under which the CAT should admit fresh evidence were elucidated in principle by the Court of Appeal in *BT v OFCOM*.<sup>157</sup> It was made clear that no party should enjoy an unfettered right to adduce fresh evidence on appeal and that parties should present their cases

<sup>147</sup> The Competition Appeal Tribunal Rules 2003 (Statutory Instrument 2003/1372); The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules (Statutory Instrument 2004/2068).

<sup>148</sup> See Consolidated Version of the Rules of Procedure of the General Court [2010] C177/02, esp arts 64–65. See further Consolidated Version of the Rules of Procedure of the Court of Justice [2010] C177/01.

<sup>149</sup> Civil Procedure Rules (SI 1998/2123). See also A Zuckerman, *Civil Procedure* (2nd edn, Thomson 2006) 17. See further CAT Guide to Proceedings (n 50) para 3.

<sup>150</sup> CAT Rules 2003 (n 147), art 19.

<sup>151</sup> *ibid* art 24.

<sup>152</sup> *ibid* art 22.

<sup>153</sup> See eg *Imperial Tobacco and others v OFT* [2011] CAT 41.

<sup>154</sup> *ibid*. Note, however, that there is a presumption against permitting the regulator under appeal to submit new evidence: see *Napp Pharmaceutical Holdings Ltd and Subsidiaries v DGFT* [2001] CAT 3, para 77.

<sup>155</sup> *Vodafone Ltd v OFCOM* [2008] CAT 22.

<sup>156</sup> *BT (British Telecommunications plc (Termination Charges: 080 calls) v OFCOM* [2010] CAT 17, para 83.

<sup>157</sup> See *BT v OFCOM* [2011] EWCA Civ 245.

during the administrative phase as fully as the circumstances permit. In sharp contrast, there is limited scope for evidence in judicial review proceedings, which was not before the original decision maker.<sup>158</sup> A High Court judge will typically refuse to allow a decision maker to adduce evidence to justify its original decision or to allow a party to challenge a decision on the basis of material that was not available to the decision maker when the original decision was made. In such cases, the High Court will normally remit the decision for reconsideration by the original decision maker on the basis of the new evidence. The rationale for that restrictive approach is that the reviewing court should normally be directing its attention to the material available to the body whose decision is being reviewed rather than deciding the merits of the case *de novo*.<sup>159</sup>

Finally, although the CAT is first and foremost an appellate tribunal and not the primary fact finder,<sup>160</sup> the information record is enhanced through its discretion to permit oral cross-examination of witnesses, especially when the primary facts are in dispute.<sup>161</sup> In fact, the tribunal has gone as far as to argue that a merits appeal ‘provides...a right to call and cross examine witness[es]’.<sup>162</sup> Although the CAT disfavors ‘prolonged cross-examination sessions that last for days and days and days’,<sup>163</sup> in a number of regulatory disputes it has ordered the cross-examination of witnesses. In the *PPC* case,<sup>164</sup> for instance, which involved a challenge against OFCOM’s determination to resolve disputes between BT and other communications providers regarding BT charges for partial private circuits (PPCs), four witnesses were cross-examined on the economic assessments underlying BT’s cost-orientation obligation. To take another example, in the *08-numbers* case,<sup>165</sup> involving two appellants (BT plc and Everything Everywhere Ltd), OFCOM as a defendant and five interveners, 49 witness statements and expert reports were adduced in

<sup>158</sup> The limited circumstances in which fresh evidence may be admitted were laid down by the Court of Appeal in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584, 595. See, however, *R (Lynch) v General Dental Council* [2003] EWHC 2987 (Admin) [2004] 1 All ER 1159, where Collins J allowed fresh evidence that was outside of the *Powis* principles against the backdrop of a technically complex area (‘its purpose is in reality to explain to the Court matters which it needs to understand in order to reach a just conclusion’, para 25). See further Part 35 of the Civil Procedure Rules and A Lidbetter, ‘Expert Evidence in Judicial Review’ (2004) 9 JR 194.

<sup>159</sup> This was the reason behind the Court’s refusal to admit fresh expert evidence in relation to the provision of public sewers in *Dwr Cymru Cyfyngedig v Environment Agency of Wales* [2003] EWHC 336 (Admin).

<sup>160</sup> In proceedings under the Competition Act 1998 Act the CAT acts both as an appellate review court and also as a court of first instance exercising the role of the primary decision maker. See further *JJ Burgess & Sons v OFT* [2005] CAT 25, where the CAT adopted its own decision, on the merits of the case, in which it disagreed with the OFT’s analysis and substituted its finding of an abuse for that of the OFT.

<sup>161</sup> See CAT Guide to Proceedings (n 50) s 3.4; *PPC* case (n 21) para 139; *BT (Termination Charges: 080 calls) v OFCOM* [2011] CAT 24, para 84.

<sup>162</sup> *VIP Communications Ltd v OFCOM* [2007] CAT 3, para 43.

<sup>163</sup> *Argos Ltd & Littlewoods Ltd v OFT* [2003] CAT 10.

<sup>164</sup> Above n 21.

<sup>165</sup> See *BT and Others v OFCOM* [2012] EWCA Civ 1002.

evidence, 13 witnesses of fact provided evidence and seven economic experts were cross-examined on the 24 reports analysing the impact of BT's proposed price charges. OFCOM has, indeed, praised cross-examination as a powerful mechanism in 'exposing witnesses whose evidence is not empirically supported, contradictory or misleading'.<sup>166</sup> In contrast, the High Court rarely hears witnesses or expert witnesses, and it has never sat with an assessor in a judicial review case.

The evidentiary constraints of judicial review before the High Court are highlighted in the *BT v Secretary of Business, Innovation & Skills* case,<sup>167</sup> involving BT's challenge, by way of judicial review, to the implementation of the Digital Economy Act 2010. The following extract from the judgment of Kenneth Parker J recognises that although economic evidence was adduced, the constraints of judicial review and of the High Court's case management rules meant that it was not possible to scrutinise the volume of the material submitted to the court:

In a case of this nature, there are real limits on the process of adjudication. Although I was confronted with 11 files of evidence, I cannot be entirely confident that all relevant material was before me, nor can the sheer constraints of judicial review proceedings afford the time that would be necessary critically and rigorously to evaluate the volume of material that was submitted. For example, a number of expert economists were deployed on each side, putting forward with equal conviction and rigour their rival cases. Experience in the Restrictive Practices Court, now extinct, suggests that a thorough exploration and assessment of such evidence could be likely to take many days of detailed cross-examination.<sup>168</sup>

In sum, the balance of comparative institutional competencies approach invites a case-by-case assessment of the differences in competence characterising the decision-making process involved in the dispute in question. In doing so, this approach rejects those normative prescriptions on deference that are informed by single-factor explanations (ie the judge does not possess expertise in economics) in favour of a richer set of factors that may determine the degree of deference owed to the regulators' economic assessments. It therefore furnishes a more pragmatic response to the challenges posed by economic evidence in regulatory disputes that is attentive to institutional realities and determinants of judicial behaviour.

<sup>166</sup> See P Weitzman (General Counsel OFCOM) and G Myers (Director of Competition Economics OFOM), 'Experiences with the CAT', presentation given at King's Centre for European Law, Tuesday 18 October 2011 <[www.kcl.ac.uk/depsta/law/news/news\\_details.php?id=544](http://www.kcl.ac.uk/depsta/law/news/news_details.php?id=544)> last accessed 17 September 2015.

<sup>167</sup> *R, on the application of British Telecommunications Plc and another v Secretary of State for Business, Innovation & Skills and Others (Open Rights Group and another, intervening)* [2011] EWHC 1021.

<sup>168</sup> *ibid* paras 213–15.

## 6. Concluding Remarks: Towards a Complementary Relationship between the Court and the Agency in the Realm of Utilities Regulation?

This article has highlighted that the substantive review of economic evidence enshrined in the regulatory agency's discretion should become sensitive to institutional competencies considerations if the challenges posed by economic evidence are to be effectively met. The pluralistic nature of the regulatory and adjudicative process—where various imperfect alternative decision makers interact—coupled with the polycentric element of regulatory disputes, brings to the forefront factors such as fact-finding competence and evidence-gathering tools that should also inform the scope of review. Through the lens of comparative institutional analysis, the regulatory and adjudicative process emerge as interdependent complements, as they may both be both equally defective in some aspects, in ensuring the soundness of regulatory decisions. Hence, deference emerges as an institutional choice of the least imperfect alternative; an essentially competence-assessment exercise. Drawing on insights from political science and economics, the suggested approach illuminates the institutional disadvantages of the courts that may warrant a high degree of deference. At the same time, however, it remains sensitive to a number of institutional realities and procedural developments that may attenuate the weight of such comparative institutional disadvantages.

Interestingly, there seem to be a few instances where US and UK courts have assessed their relative institutional competence vis-à-vis the regulators. In the US, courts have started taking into account their institutional limitations,<sup>169</sup> although, as Cass Sunstein and Adrian Vermeule argue, this recognition remains 'episodic and occasional'.<sup>170</sup> In the UK, in the adjudication of regulatory disputes that involve polycentric elements (eg the imposition of regulatory remedies), the CAT nearly always affords a considerable degree of deference to the regulators, despite its epistemic competence and the wide possibility for third party interventions that allow the representation of a greater number of interests. For instance, in the *Albion* case,<sup>171</sup> when the tribunal was asked to specify a minimum retail margin, it refrained from doing so by engaging in an implicit comparative institutional analysis of the relative

<sup>169</sup> See eg *Pacific Bell Telephone Company, dba AT&T California, et al v linkLine Communications, Inc, et al*, 555 US 438, 129 S Ct 1109 (2009) (linkLine). The Supreme Court ruled that '[i]nstitutional concerns' counsel against adopting a stand-alone price squeeze theory, at linkLine, 1120–1. The Court emphasised in particular the difficulty that exists in administering a rule that would require judges 'to police' both retail and wholesale prices and ensure that the 'interaction' between them does not 'squeeze' rival firms, and the elusiveness in trying to apply a requirement that a monopolist leave its rivals a 'fair' or 'adequate' margin: linkLine, 1120–1.

<sup>170</sup> See C Sunstein and A Vermeule, 'Institutions and Interpretation' (2003) 101 Mich L Rev 885, 887.

<sup>171</sup> *Albion Water Limited v Water Services Regulation Authority* [2006] CAT 23, para 31.



merits of the adjudicative and regulatory process, when presented with polycentric disputes:

How can the Tribunal [or a competition authority] determine this margin without examining costs and demands, indeed without acting as a price-setting regulator, the determinations of which often last for several years (and are themselves subject to appeals)? ... [H]ow [should] the Tribunal, or the Authority ... respond when costs or demands change over time, as inevitably they will. The efficient margin fixed today may, through economic and business changes, become the inefficient margin of tomorrow. We do not say that these questions are unanswerable, but we have said enough to show why courts normally avoid direct price administration, relying on more appropriate methods.<sup>172</sup>

Finally, the conclusions reached in this article may prove to be especially relevant to those countries designing or reforming appeal mechanisms in the utilities sector, such as the UK. In June 2013, the Department for Business, Innovation and Skills launched an important consultation on 'Streamlining Regulatory and Competition Appeals',<sup>173</sup> whose outcome is still pending. The proposals range widely and, if implemented, could hugely affect the appeal mechanisms for utility regulators in the UK. Amongst the most controversial ones, are those related to changing the standard of review for communications appeals from a merits review to a judicial review standard or defined grounds of appeal.<sup>174</sup> Comparative institutional analysis could inform the choice of the appropriate standard and intensity of review by requiring that any determination of the standard of review should follow and not precede that of institutional choice. Institutional choice should be comparative and include an assessment of the comparative institutional competence of all institutions engaging in the review of regulatory decisions, as discussed in this article.

<sup>172</sup> *ibid* para 55.

<sup>173</sup> See above (n 3).

<sup>174</sup> *ibid* ch 4.